

# UCC Section 2-612(3): Breach of an Installment Contract and a Hobson's Choice for the Aggrieved Party

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Thirty-five years ago, the National Conference of Commissioners on Uniform State Laws (Conference) and the American Law Institute (ALI) published the first Official Text of the Uniform Commercial Code (Code or UCC).<sup>1</sup> Since then, Article 2 of the Code, that porous codification of the rules governing contracts for the sale of goods,<sup>2</sup> has easily insinuated itself into the body of the law of contracts. Indeed, Article 2's impact extends beyond its defined scope to affect other areas of contract law, as is demonstrated by many provisions of the Restatement Second of Contracts<sup>3</sup> and by cases where the UCC clearly did not apply.<sup>4</sup> This Article, however, is not a discourse on the success of Article 2 in the world of Contract law.<sup>5</sup> Rather, the Article examines fundamental Code principles through the prism of a discrete portion of section 2-612(3),<sup>6</sup> governing the reinstatement of an installment contract after material breach by one party,<sup>7</sup> and a related issue of off-contract, restitutionary recovery under Article 2.

According to section 2-612(3), a party who suffers a material breach of an installment contract, and thus has the right to cancel the contract, must choose between exercising the right to cancel (and writing off the value of uncompensated

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1. The American Law Institute and the National Conference of Commissioners on Uniform State Laws, *UNIFORM COMMERCIAL CODE—OFFICIAL DRAFT TEXT AND COMMENTS EDITION* (1952), reprinted in 14 KELLY, *UNIFORM COMMERCIAL CODE: DRAFTS 1* (1984) [hereinafter cited by volume number, KELLY, and page number].

2. Section 2-102 of the Code provides that Article 2 "applies to transactions in goods." Section 2-106 provides that "'contract' and 'agreement' are limited to those relating to the present or future sale of goods." Unless otherwise indicated, all citations to the Code are to the 1978 Official Text, contained in *SELECTED COMMERCIAL STATUTES* (West 1985).

3. *RESTATEMENT (SECOND) OF CONTRACTS* (1981). See, W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 339 (1973) (noting, *inter alia*, the Code's impact on the Restatement 2d's treatment of unilateral and bilateral contracts); Mooney, *Old Kontract Principles and Karl's New Code: An Essay on the Jurisprudence of Our New Commercial Law*, 11 *VILL. L. REV.* 213, 257 (1966) (the Restatement 2d "has capitulated many strategic positions . . . under the doctrinal pressures generated by the Code"). One example of the influence of Article 2 on the provisions of the Restatement is Restatement 2d § 59, comment A, which bears the mark of UCC § 2-207, the Code provision on deviant acceptances.

4. See, e.g., *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 430 Pa. 550, 244 A.2d 10 (1968) (construction contract case, analogizing to §2-209 of the Code).

5. Article 2 is in effect in 49 of 50 states, the District of Columbia and the Virgin Islands. *UNIFORM COMMERCIAL CODE 1 U.L.A.* 1 (Master Ed. 1976).

6. UCC § 2-612(3) states:

"Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments."

(Emphasis added).

7. Throughout this article, "material breach" will be used interchangeably with "substantial impairment of the value of the whole contract." The analogy is apt. Cf. J. WHITE AND R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 8-3 (2d ed. 1980) (the law of material breach is useful in measuring substantiality in cases of revocation under § 2-608). Also, "material breach" is shorter.

performance as a loss) and seeking recovery<sup>8</sup> for such performance (and thereby reinstating the contract). Did the Code drafters intend to present the aggrieved party with this "Hobson's choice" and if so, why? This provision for automatic reinstatement, with no consideration of surrounding circumstances, seems anomalous in a Code containing many calculated interstices and which, in the main, gives courts the flexibility to resolve issues on a case-by-case basis. Furthermore, the provision presents the problem of reconciling restrictive literal language with the more liberal, overall thrust of the Code. I conclude that the "common-law" nature of the Code and the purposes underlying its provisions should prevail, even where the Code language appears to deny to the courts their usual interstitial role.

Part I(A) of this Article analyzes section 2-612(3) and the relevant Code comments. Part I(B) explores the genesis of the reinstatement language in section 2-612(3), within the context of the drafting of Article 2 of the UCC. Part II draws on the underlying jurisprudential basis of the Code to shed more light on the proper construction of the Section 2-612 provision.

Part III of the Article then examines two UCC cases in which a party raised the provision in the course of defending a suit for breach of an installment contract. In both cases the breaching parties attempted to whiplash the aggrieved parties by arguing reinstatement through suit. In each case the courts held that the contracts were not reinstated. The courts' resolution of the issue will be scrutinized for consistency with the history of the provision, intent of the drafters, and overall purposes of Article 2. In addition, one of the cases raises the question of whether an aggrieved party in these situations can, under the Code, elect to sue off the contract in restitution. This issue of restitutionary recovery is one which encompasses remedies available to any aggrieved party, not simply one in an installment contract. Part IV of the Article discusses the restitution issue.

This Article concludes that the wording of and comments to section 2-612(3) and that provision's legislative history do not conclusively indicate whether the Code drafters intended to create the Hobson's choice identified earlier. However, consideration of the overall purposes of Article 2, along with the foregoing, indicates that, where the intent of cancellation is clearly communicated to the breaching party, suit on past installments should not reinstate the contract.<sup>9</sup> This Article further concludes that the Code does not provide for an installment seller's rescission and traditional suit "off the contract" to recover in excess of the contract price for the goods accepted by the buyer. Such a recovery is inconsistent with the general remedial policy of the Code. Moreover, restitutionary relief in this context would require return to the distinction between divisible and entire contracts, a distinction wisely minimized in Article 2.

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8. "Recovery" includes all actions by the buyer or seller as aggrieved party, including expectation and/or consequential and incidental damages, where appropriate. The term could also include actions of an off-contract restitutionary nature, although there is some question as to whether such actions are permitted by the Code. See *infra* text accompanying notes 63-106.

9. I admit an unabashed implementation of the "method of purposive interpretation" of the UCC, as outlined by Professor McDonnell. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 853-854 (1978).

## I. UCC SECTION 2-612(3)

## A. Code Analysis

There are three circumstances under which an aggrieved party reinstates a contract under section 2-612(3): (a) if she accepts a nonconforming installment without seasonably notifying of cancellation, (b) if she demands performance as to future installments, or (c) if she brings an action with respect only to past installments. The common factor linking all three circumstances is the notion of signals sent to the breaching party—signals which reasonably indicate that the nonbreaching party considers the installment contract to continue to be in existence. While situations (a) and (b) arguably justify the presumption that such a signal has been sent, this is not necessarily the case in situation (c). Thus, it would appear that if the aggrieved party communicates a clear intention to end the contract, the breaching party should not be misled into thinking that a suit represents anything other than an attempt, after cancellation, to obtain compensation for past performance.

The first sentence in comment 6 to section 2-612 would seem to support this rationale.<sup>10</sup> It states: "Subsection (3) is designed to further the continuance of the contract *in the absence of an overt cancellation*" (emphasis added). The comment continues: "The question arising when an action is brought as to a single installment only is resolved by making such action waive the right of cancellation. This involves merely a defect in one or more installments, as contrasted with the situation where there is a true repudiation. . . ." The comment identifies the purpose of the subsection, indicating that the three situations outlined therein illustrate circumstances where there is less than an "overt cancellation," hence the continuation of the contract. The second sentence of the comment would seem to indicate that, as a matter of law, the bringing of the action for past installments reinstates the contract. But the conclusion stated in the third sentence, *i.e.* that suit on past installments "involves merely a defect in one or more installments" is not necessarily true and should be refutable by the facts of a particular case. Moreover, attempts to construe the quoted language are hampered by the organization of the comment, which, in the first two sentences, addresses the actions of the aggrieved party (*e.g.*, references to "overt cancellation" and waiver of the "right of cancellation"); in the third sentence, however, the focus shifts abruptly to the actions of the breaching party (*e.g.*, the reference to a "true repudiation"). After the third sentence, the comment then shifts back to the aggrieved party and her right to cancel.<sup>11</sup> The true

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10. The Code comments are technically the official comments of the Conference and the ALI and their authoritativeness differs from state to state. See Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 Wis. L. Rev. 597, 604 ("[M]ost state legislators probably did not consider the comments when they enacted the text of the Code"). However, it would be a mistake to disregard them, especially since courts often cite the comments in reaching decisions. J. WHITE AND R. SUMMERS, *supra* note 7, at 12. ("The courts take to the comments like ducks take to water even though the legislatures did not enact the Code comments").

11. The remainder of the Comment is as follows:

Whether the nonconformity in any given installment justifies cancellation as to the future depends, not on whether such a non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the whole contract. It is clear under this Article, however,

import and meaning of the comment is lost in the shifting of emphasis and focus.

The language of section 2-612(3) and the Code comments are less than dispositive of the issue of whether every suit on past installments should reinstate the contract. The Code, however, has a rich legislative history which one can and should examine before reaching any conclusions.

### B. Legislative History

Following each provision of the UCC, the Code drafters provided a reference to the relevant "Prior Uniform Statutory Provision," if any. In the case of section 2-612, the predecessor provision is Section 45(2) of the Uniform Sales Act (USA), which contained no reference to reinstatement.<sup>12</sup> The USA was promulgated in 1906 by the Conference.<sup>13</sup> Subsequently, prodded by increasing calls for an overhaul of the USA and by pending legislation in Congress for a Federal Sales Act,<sup>14</sup> the Conference set about the task of promulgating a revised act in 1940. In that year, the Conference issued a "Draft for a 'Uniform Sales Act, 1940'," which contained a section 57 on Delivery in Installments.<sup>15</sup> This section made no mention of reinstatement, and the accompanying comment focused more on the remedies for breach of an installment contract and assurances of performance. In 1941, the Conference released a Draft Revised Uniform Sales Act.<sup>16</sup> Section 45 of the Draft Revised Act, which was a modification and extension of section 45 of the USA and

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that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect 'waived.' Prior policy is continued, putting the rule as to buyer's default on the same footing as that in regard to seller's default.

UCC § 2-612 (3), comment 6. Comment 7 addresses the issue of seasonable notification of cancellation under § 2-612(3).

12. U.S.A. § 45(2) provides:

Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation but not to a right to treat the whole contract as broken.

Proceedings of the Sixteenth Annual Conference of Commissioners on the Uniform State Laws, DRAFT OF AN ACT TO MAKE UNIFORM THE LAW RELATING TO THE SALE OF GOODS 169 (1906), reprinted in 1 U.L.A. § 45(2), at 51-52 (1950).

13. Other uniform laws which were the products of the Conference and which later served as predecessors to various Articles of the UCC are: NEGOTIABLE INSTRUMENTS LAW (1896); UNIFORM WAREHOUSE RECEIPTS ACT (1906); UNIFORM STOCK TRANSFER ACT (1909); UNIFORM BILLS OF LADING ACT (1909); UNIFORM CONDITIONAL SALES ACT (1918); and UNIFORM TRUST RECEIPTS ACT (1933). UNIFORM COMMERCIAL CODE, 1978 OFFICIAL TEXT WITH COMMENTS AND APPENDIX 21-22 (West 1985).

14. The Proposed Federal Sales Act, H.R. 8176 76th Cong., 3d Sess. (1940) reprinted in 26 VA. L. REV. 668 (1940). See, *A Symposium: The Proposed Federal Sales Act*, 26 VA. L. REV. 537 (1940). In addition, there was movement on the international level to unify the law governing the international sale of goods. See W. TWINING, *supra* note 3, at 277. For a discussion of the International Sales Convention, see Patterson, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: UNIFICATION AND THE TENSION BETWEEN COMPROMISE AND DOMINATION, 22 STAN. J. INT'L L. 263, 266-68 (1986). See also Rabels, *The Drafts of an International Sales of Goods Act and of a Revised Uniform Sales Act*, 50 RABELS ZEITSCHRIFT 331 (1986) (a previously unpublished lecture in which the author urged cooperation among the drafters of the two laws).

15. National Conference of Commissioners on Uniform State Laws, DRAFT FOR A "UNIFORM SALES ACT, 1940" APPENDED TO AND PART OF A REPORT ON THE UNIFORM SALES ACT TO THE COMMISSIONERS ON UNIFORM STATE LAWS, reprinted in 1 KELLY 220.

16. National Conference of Commissioners on Uniform State Laws, REPORT AND SECOND DRAFT: REVISED UNIFORM SALES ACT I (1941), reprinted in 1 KELLY 269. This draft was prepared with a view towards its being incorporated into the projected Uniform Commercial Code. *Id.* at 272.

section 32 of the Proposed Federal Sales Act, likewise contained no reference to reinstatement of an installment contract.<sup>17</sup> Indeed, it was not until 1944, with the publication of the Proposed Final Draft No. 1 of the Uniform Revised Sales Act that reinstatement language appears, in section 102(3):

(3) Even though the default or non-conformity in an installment is a breach of the whole contract the aggrieved party may resort to his remedies as to that installment alone. By doing so or by demanding performance as to the balance or by accepting the installment without giving notice within a reasonable time of the intention to treat the whole contract as broken he reinstates the contract. A request for assurance is not in itself such a demand for performance.<sup>18</sup>

There was no comment accompanying section 102, captioned "Breach in Installment Contracts." Despite the absence of comment, however, the wording of the reinstatement provision indicates that reinstatement by suit followed from the aggrieved party's exercise of a choice ("may resort") to seek recovery as to the past installment "alone," notwithstanding the breach of the whole contract. The other two instances of reinstatement (demanding performance as to the balance or accepting the installment without notice of cancellation within a reasonable time) would arguably indicate to a reasonable person in the position of the breaching party<sup>19</sup> a conscious decision by the aggrieved to go forward with the contract.

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17. Section 45, entitled "Delivery in Installments" (as was the corresponding provision of the U.S.A.) provided in pertinent part:

(1) Between merchants, if the goods are to be delivered in separate installments, or if payment of part or all of the price falls due before delivery, or before delivery of a later installment, then a material default in regard to either any delivery or any payment justifies the opposing party in refusing to proceed. Acceptance of the defective delivery or payment does not impair such justification. (2) If the aggrieved party duly dispatches notification of such refusal to proceed, and the defaulting party fails to provide such prompt assurance against future material default as has mercantile adequacy in the circumstances, then the aggrieved party may cancel the contract as to the future and have his remedy for breach of the entire contract.

I KELLY 470. The other provisions addressed assurances of performance, as did the 1940 Draft, and included a statement on the policy of the section. This policy statement shed no light on the reinstatement issue.

18. The American Law Institute, *UNIFORM REVISED SALES ACT* § 102(3) (SALES CHAPTER OF PROPOSED COMMERCIAL CODE): PROPOSED FINAL DRAFT No. 1 (1944), reprinted in II KELLY 66. The remaining portions of Section 102 are as follows:

(1) Where the contract requires or authorizes delivery installments, and any installment is non-conforming  
 (a) the buyer may reject it if the nonconformity substantially impairs the value of the installment and cannot be cured or if the nonconformity is a defect in the required documents.  
 (b) if the non-conformity does not substantially impair the value of the installment or if it can be substantially cured and the seller gives adequate assurance of cure the buyer must accept it.  
 (2) the aggrieved party has all other rights and remedies provided in this Act for non-conformity or default with respect to the installment involved and, when a non-conformity or default in one or more installments substantially impairs the value of the whole contract, with respect to the undelivered balance or the whole.  
 (4) The party whose performance does not conform has the burden of establishing that the non-conformity can be cured or does not substantially impair the value of the installment or of the whole contract.

By this time the Revised Sales Act was the joint product of the Conference and the ALI and was viewed by those bodies as the predecessor to the Sales Chapter in the contemplated Uniform Commercial Code, which itself would be jointly formulated by the two organizations. See II KELLY 3. Section 102 of the 1944 Revised Sales Act appears in II KELLY 65-66.

What was to become § 2-612(3) appears in virtually identical form in § 101 of the Draft Code of Commercial Law published in 1948 by the ALI. See, The American Law Institute, *THE CODE OF COMMERCIAL LAW* (LATEST DRAFTS OF SIX OF THE ARTICLES OF THE COMMERCIAL CODE) (1948), reprinted in V KELLY 213, 282.

19. Although the terminology "reasonable person in the position of," does not appear explicitly in the § 2-612 comments or in the comments to any drafts, the tenor of the Code provision and its predecessor indicate a concern that

The 1949 Draft of the UCC contains a section 2-612(3) and accompanying comments (6 and 7) which are virtually identical to those of the Official 1952 Text and every subsequent Official Text of the Code. There is no additional light shed on the purpose behind the reinstatement language than appears in the comments 6 and 7 of the current text of the Code. Therefore, one is left with the wording of the 1944 Revised Uniform Sales Act, the first text to contain the reinstatement language, as a guide to the assumption underlying the phrase in section 2-612(3). To reiterate: the innocent party who demands future performance, accepts nonconforming goods without seasonably notifying the breaching party of cancellation of the contract or brings suit exclusively on past installment, reinstates the contract. As stated earlier, however, while an aggrieved party who demands future performance or accepts installments without seasonably cancelling sends signals inconsistent with cancellation and arguably should be held to have "waived" a right of cancellation,<sup>20</sup> this is not necessarily the case with a party who would suffer a loss if she did not recover for damages relating to the past installments.

A similar observation was made in the New York Law Revision Commission's study and evaluation of the UCC. In 1953, Governor Thomas Dewey directed the New York Law Revision Commission (Commission)<sup>21</sup> to conduct a detailed study of the Uniform Commercial Code. The study lasted three years, during which time the Conference and ALI continued to refine the Code, often with input from the Commission.<sup>22</sup> The Commission held hearings and considered reports prepared by its staff and consultants.<sup>23</sup> One of those consultants was Professor John Honnold, who, in the Commission's 1955 Study of the Code, wrote the introduction to the discussion of Article 2 and also performed analyses of several sections of Article 2, including section 2-612.<sup>24</sup>

Professor Honnold's comments on section 2-612 centered on three aspects of that Code provision: (1) the buyer's right to reject a defective installment; (2) the

the breaching party not be misled as to the intention of the aggrieved. The phrase is consistent with the "objective" theory of contract which places great emphasis on a party being responsible for the reasonable meaning to be attached to her actions. For a discussion of the objective theory in the area of assent, see E. FARNSWORTH, *CONTRACTS* § 3.6 (1983); J. MURRAY, *MURRAY ON CONTRACTS* § 19 (2d rev. ed. 1974).

20. Several pre-UCC cases held that an aggrieved party who had demanded future performance or accepted goods without seasonable notification had waived a right to cancel. *See, e.g.* *William C. Atwater & Co. v. Panama R. Co.*, 255 N.Y. 496, 175 N.E. 189 (1931); *Weinberg v. Gash*, 94 Misc. Rep. 303, 158 N.Y.S. 179 (1916).

21. The Commission is a permanent governmental body of the state of New York. *See* State of New York Law Revision Commission Report, *STUDY OF THE UNIFORM COMMERCIAL CODE* (1954), v.1, Introduction (Burststein and Epstein, eds., Reprint Ed., 1980) [hereinafter cited by volume number (where appropriate), REPORT, page number, and year; while the Commission documents are reprinted with their original page numbers at the top, page cites will be to the bottom page sequential numbering of the reprinted editions]. The records of the Commission's work are said to constitute "the richest single source of 'legislative history'" on the UCC. R. BRAUCHER & R. RIEGERT, *INTRODUCTION TO COMMERCIAL TRANSACTIONS* 28 (1977). For articles summarizing the legislative history of the Code, see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COL. L. REV. 798 (1958); Malcolm, *The Uniform Commercial Code: Review, Assessment, Prospect—November, 1959, 1960 BUS. LAW*, 348 (Jan. 1960); and Schnader, *A Short History of the Preparation of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, (1967).

22. *See*, Malcolm *supra* note 21, at 350. The Commission began its study with the 1952 Official Text and in the course of its review also considered the Revised Edition published in 1954, as well as recommended changes to the Code proposed by an Enlarged Editorial Board and published in 1955. REPORT 18 (1956). The Commission also had available to it unpublished reports of subcommittees of the Enlarged Editorial Board.

23. REPORT 18 (1956).

24. 1 REPORT 337-43 (1955).

buyer's right to cancel the contract;<sup>25</sup> and (3) the scope of section 2-612 as indicated by the definition of "installment contract." His comments on the "reinstatement of rights under contract subject to cancellation" are insightful and warrant extensive quotation:

The latter part of subsection (3) provides that the aggrieved party (either buyer or seller) 'reinstates' the contract when he either (a) 'accepts a non-conforming installment without seasonable notifying of cancellation' or (b) 'brings an action with respect only to past installments' or (c) 'demands performance as to future installments.' The Uniform Sales Act has no comparable provision. The cases have, on occasion, held that an innocent party has 'waived' his right to cancel; a similar idea seems to underlie the Code provisions on failure to notify of cancellation and on demanding performance as to future installments. *There is, however, little support in present law for the further provision that the contract rights of the breaching party are reinstated if the aggrieved party 'brings an action with respect only to past installments'.* This language could produce novel and probably unintended consequences (emphasis added; citations omitted).<sup>26</sup>

Professor Honnold went on to hypothesize the case of a buyer who exercises his right to cancel, covers at a price equal to the contract price and sues to recover for the consequential damages resulting from past nonconforming installments. He concluded that reinstatement of the seller's rights would lead to "an untoward result," which should be avoided by rewriting subsection (3) so that reinstatement would follow from actions demanding future performance, thus constituting a waiver of the right of cancellation.<sup>27</sup>

In the Commission's Final Report to the Legislature Relating to the Uniform Commercial Code, it recommended, *inter alia*, revision of the section on installment contracts "to correct what seem[ed] to it errors of drafting."<sup>28</sup> In an Appendix to the Report, among the comments on section 2-612, there appears the following:

It was pointed out that the clause in subsection (3), 'or if he brings an action with respect only to past installments' would include an action for consequential damages for such installments and could produce anomalous results unless limited to such actions as are in effect, a demand for future performance. It was recommended that the clause be deleted.<sup>29</sup>

Other fact situations come to mind where the literal application of the language in section 2-612 could lead to "anomalous results." The buyer in Professor Honnold's hypothetical might justifiably forego a cover remedy and, if the market and contract prices are the same at the time the buyer learns of the breach,<sup>30</sup> seek

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25. *Id.* at 541-42 (1955). While this section of Professor Honnold's analysis of § 2-612 was entitled "'buyer's right to cancel the contract'" (emphasis added), as his analysis indicates, § 2-612(3) addresses the right of the aggrieved party, buyer or seller, to cancel. *Id.*

26. *Id.* at 542.

27. *Id.* at 542-43. Although he did not say so, I assume that Professor Honnold would have included in addition those cases where the aggrieved party accepted a nonconforming installment and subsequently failed to give timely notice of cancellation.

28. REPORT 37 (1956).

29. *Id.* at 393.

30. UCC § 2-713 provides that when the seller fails to deliver or repudiates, the buyer has the right to recover the difference between the market price at the time when the buyer learned of the breach and the contract price. For the various ways of determining market price when there has been an anticipatory repudiation of the contract, see J. WHITE AND R. SUMMERS, *supra* note 7, at 242-47.

consequential or incidental damages related to the past installments. Or the buyer may have paid in advance for non-delivered goods and may want to seek recovery of moneys paid. On the seller's side, there may be a case where the seller delivers several installments and receives no or only partial payment for the goods. If the seller resells the remaining contract goods for a price at or greater than the contract price,<sup>31</sup> or does not resell and the market price of the remaining goods is at or above contract price,<sup>32</sup> she may want compensation for the goods delivered.<sup>33</sup>

Despite the Commission's recommendation that the reinstatement language be deleted, the Editorial Board of the UCC took no such action.<sup>34</sup> There were no reasons given for retaining the language and we are left, once again, to speculate as to what the drafters intended by the provision. One last source of guidance remains to be examined: the underlying legal philosophy of the Code.

## II. CODE JURISPRUDENCE

The key to understanding the language in section 2-612(3) lies not only in the accompanying comments and the legislative history of that provision but also in the jurisprudential character of the Code generally and Article 2 in particular. Much has been said, and rightly so, of Karl Llewellyn's singular influence on the substance of the Code, especially Article 2.<sup>35</sup> He served as Chief Reporter of the Code and was

31. UCC § 2-706 allows a seller to resell contract goods and recover the differential between the contract and resale prices.

32. UCC § 2-708(1) allows a seller to recover the differential between the contract and market prices. The two seller hypotheticals assume that the seller is not a lost volume seller, for whom a remedy under § 2-708(2) would be available, even if there is a resale at or above contract price or if the market price at the time of delivery is equal to or greater than the contract price. *Cf.*, *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

33. A major issue is whether the seller seeking compensation for delivered and accepted goods is limited to a recovery on the contract or has the option of suing off the contract, in *quantum valebant*, and recovering an amount in excess of the contract price. *Compare*, *Mather, Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 YALE L.J. 14, 20-21, n. 20 (1982) (no) with *Nordstrom, Restitution on Default and Article Two of the Uniform Commercial Code*, 19 VAND. L. REV. 1143 (1966), (arguably, yes). *See infra* text accompanying notes 63-106 for further discussion of this issue.

34. Interestingly, the Editorial Board did respond to one other § 2-612 recommendation, relating to the definition of an installment contract. The 1952 version of § 2-612(1) contained a requirement that goods be delivered in separate lots "to be separately accepted and paid for," in order for a contract to fall within the Code provision. The American Law Institute and the National Conference of Commissioners on Uniform State Laws, *UNIFORM COMMERCIAL CODE OFFICIAL DRAFT TEXT AND COMMENTS* (1952), reprinted in XIV KELLY 1, 243. In his 1955 analysis of § 2-612(3) for the Commission, Professor Honnold suggested the deletion of the words "and paid for." 1 REPORT 543 (1955). He stated that the requirement of separate payment might be difficult to apply and further pointed out that there appeared no reason for the language. *Id.* When the UCC Editorial Board issued its 1956 recommendations for changes in the Code, included therein was a deletion of the words "and paid for" from § 2-612(1). The American Law Institute and the National Conference of Commissioners on Uniform State Laws, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, reprinted in XVIII KELLY 1, 93. The Editors explained that the change was in response to the criticism of the New York Law Revision Commission. *Id.* *See also* REPORT 385-86, 389-90 (1956).

The retention of the reinstatement language does not necessarily mean that the Board rejected the Commission's concern. The Board may have chosen to focus on the most egregious drafting errors which were not ameliorated by the comments.

35. *See generally* Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); Mooney, *supra* note 3. *See also*, W. TWINING, *supra* note 3, at 302-40 and J. WHITE AND R. SUMMERS, *supra* note 7, at 5-6.

Llewellyn referred to Article 2 as the "heart of the Code." Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 378 (1957).



extensively involved in drafting Article 2.<sup>36</sup> Llewellyn believed in statutes writ large and broad, leaving judges the opportunity, indeed the duty, to fill in the interstices. This philosophy, applied to commercial legislation, would produce a code capable of growing with and responding to an ever-changing commercial reality.<sup>37</sup>

The UCC has been described as a "common law code"<sup>38</sup> and Article 2 as "a document whose thrust is not so much to put law on the statute books as it is to coerce courts into looking for law in life."<sup>39</sup> The common law nature of the Code lies not only in the backward look to the source of its rules but also in the forward-looking design of its provisions, which allows for decisions to be based upon the facts of a given case, in light of the purpose of a given rule. The ubiquitous presence of the term "reasonable" in Article 2<sup>40</sup> is one example of the deliberately, open-textured nature of the Code and is a testament to Llewellyn's philosophy that "[s]emi-permanent Acts must envisage and must encourage *development* by the courts."<sup>41</sup>

Llewellyn complemented his philosophy of code drafting with very definite ideas about how statutes were to be construed. Those ideas were in turn consistent with his overall promotion of judicial decisionmaking in the "Grand Style" or the "Grand Manner":<sup>42</sup> "[t]he courts have duties of creation with regard to statutory rules quite as much with regard to case law, and the way to perform them is by

36. W. TWING, *supra* note 3, at 300. He also chaired the Conference Committee which undertook the revision of the U.S.A., the product of which was the immediate predecessor to Article 2. *Id.* at 278-85.

37. See e.g., National Conference of Commissioners on Uniform State Laws, REPORT AND SECOND DRAFT OF THE REVISED UNIFORM SALES ACT (1941), reprinted in 1 KELLY 269, 302-05. In this joint report of the Section on Uniform Commercial Acts and the Special Committee on a Revised Uniform Sales Act, both of which were chaired by Llewellyn, is a section entitled "The Problem of a Semi-Permanent Code of a Whole Field." After praising judicial decisions where the courts "work[ed] out the effect of the statute quite as much in terms of its sense and purpose as in terms of its meticulously examined wording," *id.* at 305, the Report went on to state:

This manner of approach to statutes is peculiarly needed and is also peculiarly to be expected, when the statute is both non-political, and non-criminal, in character. It is a manner utterly necessary to the on-going rejuvenation of a semi-permanent body of written law, amid the inevitable changes of modern conditions. The way to induce a consistent approach by the courts in these terms is:

(a) to invite that approach expressly, and give it legislative authorization;  
 (b) to make explicit the principles which underlie any series of particular provisions;  
 (c) to provide an authoritative Comment full enough so that the reason and reasonableness of the provisions and the principles are both apparent, and cannot be mistaken; and so that is easy to see, also, where the reason of a provision leaves off."

*Id.* The last point is reminiscent of Llewellyn's oft-quoted statement: "[t]he rule follows where its reason leads; where the reason stops, there stops the rule." K. LLEWELLYN, *THE BRAMBLE BUSH* 157-58 (1960).

38. Mooney, *supra* note 3, at 222, n.14 (the UCC is a "common law code" in the sense that it is a "statute derived from the common law of commercial transactions by means of close factually-oriented techniques").

39. Danzig, *supra* note 35, at 635.

40. See, e.g., UCC §§ 2-205, 2-206(1), and 2-305(1), (3), and (4). See Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185-86, 209-13 (1967) (criticizing the Code's frequent and (he argues) inconsistent use of the word "reasonable"); Taylor, *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 349-52 (1978) (recognizing that some sections of Article 2 should be nebulous, including provisions having a standard of reasonableness, but pointing out that this leads to "unavoidable nonuniformity").

41. K. Llewellyn, *Re: Possible Uniform Commercial Code* (undated memorandum to the Executive Committee on Scope and Program of the Conference Section of Uniform Commercial Acts), reprinted in W. TWING, *supra* note 3, at 524, 526.

42. See, K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 36 (1960) ("[T]he Grand Style of the Common Law . . . [is] a way of thought and work, not . . . a way of writing. It is a way of on-going renovation of doctrine . . ."). *Id.* Compare this language to the quote from the 1941 Conference Report, *supra* note 37.

recognizing what they are . . . .”<sup>43</sup> In addition: “The simple basic principle which expresses both the Grand Manner and today’s need is this: It is contrary to a Supreme Court’s duty, and therefore its legitimate power, to allow any statute to remain as an undigested and indigestible lump in the middle of Our Law.”<sup>44</sup>

Similar exhortations appear in the UCC Comments, particularly comment 1 to section 1–102 (Purposes; Rules of Construction; Variation by Agreement):

This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. *It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.* However the proper construction of the Act requires that its interpretation and application be limited to its reason (emphasis added).<sup>45</sup>

The last sentence of the excerpt also echoes Llewellyn’s belief that the meaning and purpose of legislation are crucial to the understanding and proper construction of that legislation.<sup>46</sup> Section 1–102 itself contains the directive: “This Act shall be liberally construed and applied to promote its underlying purposes and policies.”

Thus, each Code provision is to be viewed in light of commercial reality and the purpose behind its drafting. Comment 6 to section 2–612, as stated earlier, states that the purpose of subsection (3) is the continuation of an installment contract in the absence of an “overt cancellation.” If that be the purpose, how is the purpose to be achieved when a suit falls within the literal language of section 2–612(3)? An examination of case law will determine how faithfully the Code language has been applied.

### III. THE *Kunian* and *Cherwall* Decisions

There are only two cases where the section 2–612 reinstatement issue was squarely presented to a court; the Supreme Court of Connecticut decided both cases. In *Kunian v. Development Corp. of America*,<sup>47</sup> the seller of plumbing and heating supplies ceased performance and brought suit against the buyer/contractor after the buyer had failed to pay for several deliveries. The buyer argued, *inter alia*, that by bringing the suit, the seller had reinstated the contract and that the seller’s failure to perform the reinstated contract amounted to a material breach. In addressing this argument, the court referred to a meeting between the parties during which the seller had attempted to obtain adequate assurances of performance from the buyer. The buyer promised future performance but subsequently reneged. The buyer’s failure to keep the promise provided the seller with “reasonable grounds for insecurity” within the meaning of section 2–609(1),<sup>48</sup> such that the seller’s later decision to withhold

43. K. LLEWELLYN, *supra* note 42, at 378, quoting from *Address on the Current Recapture of the Grand Tradition, to the Conference of Chief Justices, Miami Beach, Florida, August 18–22, 1959*, 9 U. CHI. LAW SCHOOL RECORD 6 (1960).

44. *Id.*

45. One commentator referred to § 1–102 as the most important Code section and the comment to § 1–102 as the most important Code comment. Skilton, *supra* note 10, at 609.

46. K. LLEWELLYN, *supra* note 42, at 379.

47. 165 Conn. 300, 334 A.2d 427 (1973).

48. § 2–609(1) provides:

further deliveries until the buyer guaranteed payment of the contract price was a proper demand for adequate assurances. The court went on to hold that the buyer's failure to provide such assurance "within a reasonable time after the request and after the action had been brought was a repudiation of the contract and the plaintiff was excused from further performance under the contract."<sup>49</sup>

The language quoted from the opinion immediately raises at least one question. What did the court mean when it stated that the buyer/defendant's failure to provide adequate assurances "after the action had been brought" justified the plaintiff's refusal to make further deliveries under the contract? If, shortly after the plaintiff filed suit, the defendant had offered to pay the outstanding amounts, would the plaintiff have been required to continue the contract? Would payment by the defendant turn what was initially not a reinstatement (the filing of the suit) into a reinstatement, retroactively? Or did the plaintiff's suit reinstate the contract but the defendant's subsequent failure to pay constitute a material breach, excusing the plaintiff from further performance? The court's opinion, cryptic in this regard, offers no clue to the answers to these questions. Clearly, the court concluded that the defendant had repudiated the contract; however, the court failed to address adequately the reinstatement argument made by the defendant. The court more directly addressed this issue in *Cherwell-Ralli, Inc. v. Rytman Grain Co., Inc.*<sup>50</sup>

In *Cherwell*, the seller of meal products in an installment contract sued the buyer for money due for products delivered and accepted. The buyer had been delinquent in payments from the beginning of the contract period. In addition, the buyer made a partial payment by check but subsequently stopped payment on the check on the basis of a rumor that the seller's plant was closing. The court concluded that this action of the buyer was not warranted under the circumstances, substantially impaired the

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A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

49. 165 Conn. at 313, 334 A.2d at 433. The relationship between § 2-609 and § 2-612 (3) has been noted in the following law review articles and treatises: Note, *Breach of Installment Contracts Under the Uniform Commercial Code*, 7 WILLIAMETTE L.J. 107, 118 (1971) (stating that, under § 2-612 (3), the aggrieved party who demands assurances of future performance reinstates the contract and arguing that a party should be able to exercise her rights under § 2-609, without losing the right to cancel if such assurances are not forthcoming; the result in *Kunian* is consistent with this position); Note, *A Comparison of California Sales Law and Article Two of the Uniform Commercial Code*, 11 U.C.L.A. L. REV. 78, 98 n. 677 (noting the right of a party to adequate assurances of performance under § 2-609 and potential for loss of the right to cancel where assurances are sought in an installment contract and concluding that the Official Comment to § 2-612 gives precedence to the exercise of rights under § 2-609); 1 R. ALDERMAN, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 288-89, n. 742 ("The breach of an installment contract that does not substantially impair the value of the whole contract might be reasonable grounds for insecurity with respect to future installments" for which a party may seek adequate assurances of performance and, in the absence of such assurances a party could treat the contract as breached, citing *Kunian*; accord, 3A BENDER'S UNIFORM COMMERCIAL SERVICE § 14.02[3] at 14-50). See also, Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A roadmap for Article Two*, 73 YALE L.J. 199, 227 (1963) (more a linkage between § 2-612(2) and § 2-609).

The last sentence of section 102(3) of the Proposed Final Draft No. 1 of the Uniform Revised Sales Act distinguished between demanding performance as to the balance of a contract (compare a demand for "performance as to future installments" under § 2-612(3)) and a request for assurances (compare a request for "adequate assurance of performance" under § 2-609). See *supra* text accompanying note 18.

50. 190 Conn. 714, 433 A.2d 984 (1980).

value of the whole contract to the seller, and thereby justified the latter's cancellation of the contract and suit. To the buyer's rejoinder that the seller's suit to recover on the past installments reinstated the contract, the court responded:

Nor is the seller's remedy to cancel waived, as the buyer argues, by a law suit seeking recovery for payments due. While Sec. 42a-2-612(3) [of the Connecticut General Statutes] states that a contract is reinstated if the seller 'brings an action with respect *only* to past installments' (emphasis added), it is clear in this case that the seller intended, as the buyer well knew, to bring this contract to an end because of the buyer's breach.<sup>51</sup>

The court, then, focused on two facts in deciding whether the suit reinstated the contract: (1) the seller *intended* to end the contract, and (2) the buyer was aware of that fact. The suit, therefore, did not automatically reinstate the contract.

The *Cherwell* decision, although arguably contrary to the literal language of section 2-612(3), is consistent with the stated purpose of the rule.<sup>52</sup> The Code simply states that an aggrieved party reinstates the contract if he brings an action with respect only to past installments. That describes exactly the actions of the sellers in both *Cherwell* and *Kunian*. However, at least in *Cherwell*, an overt cancellation took place, which the court held was sufficient to preclude reinstatement. This situation is one where "the reason stops" and thus so should the rule.<sup>53</sup>

There is, however, another possibility. That is, that the provision for reinstatement is consistent with the Code's general bias in favor of the establishment and continuation of contracts in general and installment contracts in particular.<sup>54</sup> For example: (1) it is easier to establish a contract under the UCC than under pre-Code law;<sup>55</sup> (2) the definition of an installment contract is broadly stated "so as to cover installment deliveries tacitly authorized by the circumstances or by the option of either party;"<sup>56</sup> and (3) the Code provisions make it more difficult to cancel installment contracts than "single-shot" contracts.<sup>57</sup> Moreover, one cannot overlook

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51. *Id.* at 719, 433 A.2d at 987. The buyer also argued, unsuccessfully, that the seller had to utilize the UCC provisions governing adequate assurances of performance (§ 2-609) before exercising the right to cancel an installment contract. The court pointed out that, if the actions of the buyer are such as to constitute substantial impairment of the contract to the seller, there is no need to ask for adequate assurances of the buyer. *Id.* at 718, 433 A.2d at 986-87. In so doing, the court distinguished *Kunian* as a case where there may have been reasonable doubt as to whether the buyer's breach was substantial. *Id.* at 718, 433 A.2d at 987.

52. Inconsistency between Code language and accompanying comments is not unusual in Article 2. Another, perhaps more noted example is the disparate treatment accorded "different" terms in § 2-207(2) and comment 3 to § 2-207. See J. WHITE AND R. SUMMERS, *supra* note 7, at 27, n.7.

53. See Carroll, *Harpooning Whales, of Which Karl N. Llewellyn is the Hero of the Piece; or Searching for More Expansion Joints in Karl's Crumbling Cathedral*, 12 B.C. IND. & COMM. L. REV. 139, 150 (1970) ("It is an understatement to suggest that the Code is not artfully drawn, and it seems reasonable to suggest that courts should either avoid or approach with great caution interpretations based upon technical grammatical constructions") and Skilton, *supra* note 10, at 609 ("Code sections should not be applied literalistically without consideration of results"). See also W. TWING, *supra* note 3, at 322 (noting the Code's requirement that its provisions be liberally construed and referring to "the Golden Rule" of interpretation which dictates departure from the literal meaning of words when application of that meaning "would lead to an absurdity").

54. See, e.g., T. QUINN, *UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST* § 2-612 [A] [4] (1978) (Supp. 1986) ("[t]he UCC loves the installment contract, and, once it is in place, bends over backwards to keep it in place").

55. See, e.g., UCC § 2-204 (and the "open term provisions in 2-305 to 2-312) and 2-207. See also J. CALAMARI AND J. PERILLO, *CONTRACTS* 51-53 (2d ed. 1977).

56. UCC § 2-612, comment 1.

57. Compare UCC § 2-601 (the buyer's right to reject goods which "fail in any respect to conform to the contract" (giving rise to the right to cancel)—said to embody the "perfect tender rule," which, however, is modified by the seller's

the fact that, even if the reinstatement by suit language in section 2-612(3) was initially the result of oversight, the 1955 and 1956 Reports of the New York Commission alerted the Code drafters to the potential "anomalous results" of the literal application of that provision.<sup>58</sup>

Notwithstanding the foregoing, suit on past installments, where it is clear the aggrieved party has exercised the right to cancel<sup>59</sup> should not reinstate the contract. While it is true that the Code favors the continuation of installment contracts, as evidenced by the necessity for substantial impairment of the value of the whole contract before cancellation can occur, once that standard has been satisfied it makes no commercial sense to *force* a party to choose between just compensation for past performance and adherence to a contract materially breached by the other party.<sup>60</sup> The most sensible construction is that the Code only seeks to continue such contracts in the absence of overt cancellation. This conclusion is bolstered by the fact that the Code provides for reinstatement<sup>61</sup> when suit is brought with respect *only* to past installments; suit for damages on the whole contract has no such effect.<sup>62</sup> In the latter instance, suit unmistakably signals cancellation of the contract.

Finally, the Code drafters' failure to respond to the criticism in the New York Commission Reports does not necessarily indicate an intention to force the Hobson's choice on the aggrieved party. Rather, that inaction is better explained by comment 6 to section 2-612, which states the purpose of the provision, and by the overall command to judges in section 1-102 to construe the Code in light of its purposes. The crucial interstitial role demanded of judges made it both unnecessary and counter-productive to dot all of the "i"'s and cross all of the "t"'s.

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right to cure under § 2-508) with § 2-612(3) (requiring substantial impairment of the value of the whole contract for cancellation). The New York Law Revision Commission noted this differential treatment and recommended that the two provisions be harmonized with substantial impairment or material breach being prerequisite to the right to cancel in all cases. See REPORT 36-37, 389-90. See also, Honnold, *Buyer's Right of Rejection* 97 U. PA. L. REV. 457, 476-78 (1949) (discussing the distinction in predecessor provisions of the Draft Revised Uniform Sales Act).

58. See *supra* text accompanying notes 26-29.

59. In referring specifically to those cases where the aggrieved party makes clear an intention to cancel, I recognize that where such an intention is not clear, a suit on past installments could reinstate the contract. See R. BRAUCHER AND R. RIEGERT, *supra* note 21, at 311 (observing that, under § 2-612(3), an aggrieved party can unintentionally reinstate a contract).

60. Of course, an aggrieved party may choose to go forward with a contract, despite material breach by the other party to the contract. However, the issue here is whether the aggrieved is forced to make that choice in order to recover damages.

61. Actually, the use of the word "reinstates" in § 2-612(3) is infelicitious. The reinstatement provision governs situations where an aggrieved party has failed to make an overt cancellation. Therefore, the provision should more accurately refer to a waiver of the right of cancellation, as does comment 6 to § 2-612 (3). See *supra* text accompanying notes 10 and 11, and *Cherwell*, 180 Conn. at 719, 433 A.2d at 987 ("Nor is the seller's remedy to cancel waived . . . by a lawsuit seeking recovery for payments due"). In other words, how can the aggrieved "reinstate" a contract which the Code assumes that party has not effectively cancelled?

62. For cases where aggrieved parties recovered damages on the whole contract and the courts did not discuss reinstatement, see *Trans World Metals, Inc. v. Southwire Co.*, 769 F.2d 902 (2d Cir. 1985); *Kirkwood Agri-Trade v. Frosty Land Foods International, Inc.*, 650 F.2d 602 (5th Cir. 1981); *Autonumerics, Inc. v. Bayer Industries, Inc.*, 696 P.2d 1330 (Ct. App. Ariz. 1985).

## IV. THE RESTITUTION ISSUE

Assuming the court in *Cherwell* decided the reinstatement issue correctly, there remains another interesting issue that was actually raised by the plaintiff in *Kunian*. The seller in that case sought to recover, not the contract price, but the reasonable value of the delivered goods<sup>63</sup> and thereby raised the spectre of the common law "rescission" and suit off the contract in *quantum meruit*.<sup>64</sup> The court rejected this argument, pointing to the fact that the seller's complaint "stated an action on the contract," thereby limiting recovery to the contract price.<sup>65</sup> In addition, the court determined that where a seller fully performed all or "certain installments of a divisible contract," the proper remedy was an action for the price under section 2-709 of the Code.<sup>66</sup> Since the court held that the seller's complaint precluded recovery off the contract, there remains the question whether, under the Code, an aggrieved party retains an option to rescind and sue off the contract, in *quantum meruit*.

The general scheme of Article 2, as relates to the ability of an innocent party to put an end to a contract and sue for damages, is quite simple. Looking at this issue from the perspective of the innocent buyer, where that party has a right to cancel,<sup>67</sup> the party may, in addition to exercising that right, recover any payments made to the seller and also recover either the difference between the contract price and the price of a substitute contract or the difference between the contract price and the market price of the goods at the time the buyer learned of the breach.<sup>68</sup> Thus, the buyer can end the contract and receive restitution of the contract price paid plus expectation damages. This was not always the case.<sup>69</sup> Indeed, under pre-Code law, the buyer was required to elect her remedies and either rescind the contract and sue off the contract

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63. 165 Conn. at 315, 334 A.2d at 434. The reasonable (translate market) value of the goods was higher than the contract price.

64. If one were using the common law forms of action, *quantum meruit* would refer to cases where the nonbreaching party rendered services; *quantum valebat* (singular, or *valebant*, plural) would be used in cases where the nonbreaching party sold and delivered goods. In either case, the plaintiff is seeking the value of what was rendered to the defendant.

Professor Murray urges that the term "rescission" should be used solely to describe the discharge of a contract by mutual agreement of the parties. J. MURRAY, *supra* note 19 § 252, at 510, n.41. *See also*, CORBIN, CONTRACTS § 1104, at 558 (1964). However, courts often use the term to describe a party's unilateral ending of a contract for cause, followed by a suit off the contract seeking restitutionary damages. *See, e.g.*, *Boomer v. Muir*, 24 P.2d 570, 573 (Cal. App. 1933). On the myriad meanings of rescission, see J. WHITE AND R. SUMMERS, *supra* note 7, at 295 and Mooney, *supra* note 3, at 238, n.36.

For the purposes of this Article, "rescission" refers to a nonbreaching party's unilateral ending of a contract due to the breach of the other party. This use of the terms is, I recognize, technically inaccurate; it is, however, consistent with the use of the term in many court decisions and the U.S.A. More importantly, it is this meaning, combined with the notion of "election of remedies," which caused such a negative reaction among the Code drafters. *See infra* note 71 and 86.

65. 165 Conn. at 315, 334 A.2d at 434.

66. *Id.*

67. Such a right exists because of (a) the seller's failure to deliver, (b) the seller's repudiation, or (c) the buyer's rightful rejection or justifiable revocation of acceptance. *See* § 2-711(1).

68. § 2-711(1)(a) and (b). This does not include cases where the seller is insolvent. *See Nordstrom, supra* note 33, at 1177-78 (discussing § 2-502).

Other remedies enumerated in § 2-711(2) and (3) are not relevant to this discussion.

69. *See Nordstrom, supra* note 33, at 1175.

for return of the price paid or sue on the contract and recover damages for breach.<sup>70</sup> All of this ended with the enactment of section 2-711.<sup>71</sup>

On the seller's side, pre-Code law prohibited the seller who had fully performed from rescinding the contract and suing off the contract for the value of the goods delivered and accepted; she had to sue on the contract for the contract price.<sup>72</sup> This followed from the application of a general rule which provided that a party who had completely performed a contract and was only due the payment of money could not sue off the contract, in *quantum meruit*, when the other party materially breached. Rather, the nonbreaching party was required to sue on the contract for the contract price.<sup>73</sup> One reason given for this peculiar circumstance<sup>74</sup> is that a debt was created by the party's full performance and suit had to be on that debt;<sup>75</sup> yet another reason is that a party should not get more than what was contracted for in exchange for her performance.<sup>76</sup> Conversely, a nonbreaching party who had not completely or near completely performed prior to the material breach of the other contract party had the option of suing on the contract, and receiving appropriate contract damages, or "rescinding" the contract and suing in *quantum meruit*. It was necessary in the *quantum meruit* action that the plaintiff rescind the contract; this act of ending the contract, making it a nullity, allowed the court to disregard the contract price and award damages based upon the fair market value of the goods or services rendered.<sup>77</sup>

Things became tricky when the plaintiff was to render performance in installments. For example, should the breach of such a contract after, say, three-fifths of the

70. See, e.g., U.S.A. § 69, reprinted in 1 U.L.A. 294-95 (1950) (buyer's remedies for breach of warranty). As used in this Article, "election of remedies" refers specifically to a choice between a contract damage remedy and a restitutionary remedy. There is still, in the general sense, some election of remedy under the Code. See, e.g., the buyer's alternative remedies under §§ 2-712, 2-713 and 2-714.

71. See *supra* text accompanying notes 67 and 68. Karl Llewellyn stated flatly that U.S.A. § 69(2)'s "rule of election for buyers [did] not make sense." Llewellyn, *On Warranty of Quality, and Society: II*, 37 COL. L. REV. 341, 390 (1937). He expressed sympathy for the buyer who, having returned defective goods, learned to her dismay that she had "claimed and been granted" a remedy and was limited to recovery of the purchase price. *Id.* at 391. Llewellyn's views are reflected in § 2-711.

The Code Drafters' intention to remove the old shibboleth of "election of remedies" for the aggrieved buyer is also seen in the provisions governing revocation of acceptance. Comment 1 to § 2-608 states that:

[T]he buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach.

Both are now available to him . . . . The section no longer speaks of 'rescission,' a term capable of ambiguous application . . . and susceptible also of confusion with cancellation for cause . . . .

It should be noted that restitution under § 2-711 does not result from the old "rescission" but rather from the buyer's exercise of the right to cancel and pursue the contract remedies provided by the Code.

72. See Nordstrom, *supra* note 33, at 1152. Any references to off-contract remedies apply solely to actions brought by nonbreaching parties; this Article does not address off-contract suits by breaching parties. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 374.

73. *Oliver v. Campbell*, 273 P.2d 15 (S. Ct. Cal. 1954). This was a case involving the services of an attorney and not the sale of goods; however, it is recognized as stating a rule which was applied in the sales context as well. See, Nordstrom, *supra*, note 33, at 1152.

74. Perhaps it is more peculiar that the partially performing plaintiff could recover in excess of the contract price in a *quantum meruit* action. See, Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264, 269-70 (1959).

75. This rationale can be traced to the debt origins of common law informal contract actions. See, J. CALAMARI AND J. PERILLO, *supra* note 55, at 577.

76. See, Palmer, *supra* note 74, at 266.

77. Rescission in those cases referred not only to the cancellation of an executory portion of a contract but also to the actual nullification/destruction of the contractual agreement. See, Nordstrom, *supra* note 33, at 1165, n.94; Palmer, *supra* note 74, at 273. Both Palmer and Nordstrom criticized the concept of destroying the contract as a necessary prerequisite to the award of restitutionary relief in excess of the contract price.

performance was rendered allow the innocent party to sue in *quantum meruit*? If the contract was "divisible," meaning that each performance block constituted a separate contract, then breach after three of five performances would not necessarily entitle a nonbreaching party to sue off the contract. In other words, after rendering each performance, it would be as though the performance of that "divisible" contract was complete, thus invoking the full performance rule.<sup>78</sup>

In *Wellston Coal Co. v. Franklin Paper Co.*,<sup>79</sup> the parties had entered a contract whereby the plaintiff seller was to supply the defendant buyer's needs for coal during a one-year period. The buyer purchased coal as agreed during the months when the contract price was lower than market price. However when the contract and market prices were the same, the buyer repudiated the contract. The court found that the buyer had prevented the seller from completing performance of the contract; therefore, the seller could rescind the contract and sue in *quantum meruit*, recovering the difference between the contract price paid by the buyer and the higher market price.<sup>80</sup> The result in *Wellston* was consistent with many pre-Code cases.<sup>81</sup>

The question then is whether, given similar facts, the same result could be reached under the UCC. Since the Code does not explicitly provide for restitutionary recovery<sup>82</sup> resolution of this issue requires consideration of the provisions of section 1-103 of the Code: "Unless displaced by the particular provisions of this Act, the principles of law and equity including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." Can it be said that the Code "displaces" the common law remedy of off-contract restitutionary recovery for the aggrieved seller in an installment contract?<sup>83</sup>

Because pre-Code law, including the USA,<sup>84</sup> ascribed an election of remedies to a party's rescission of a contract, the Code eschews rescission, preferring instead the

78. See 1 G. PALMER, *THE LAW OF RESTITUTION* § 4.16(a), at 500 (1978). This was the rationale of the court in *Kunian*.

79. 57 Ohio St. 182, 48 N.E. 888 (1897).

80. *Id.* at 185. 48 N.E. 889. The court impliedly found the contract was "entire" and "not divisible." *Accord*, *Smith v. Keith & Perry Coal Co.*, 36 Mo. App. 567 (1889) (in this case, the court expressly found the contract to be "entire").

81. See 3 WILLISTON, *SALES* § 593, at 282 (rev. ed. 1948) and cases cited therein. Williston implied that in a partially performed entire contract, the seller would be unable to sue on the contract. See also Nordstrom, *supra* note 33, at 1165. Nordstrom noted that in non-sales cases the plaintiff's recovery was often limited by the contract price.

82. For the remainder of this discussion, "restitutionary recovery" will refer to the installment seller's recovery in excess of the contract price. If the seller is allowed a restitutionary recovery under the Code, there remains the question of whether incidental damages should be allowed. See 1 G. PALMER, *supra* note 78 § 4.8, at 435-36.

83. For all intents and purposes, the availability of rescission and suit off the contract is a non-issue for the buyer in any kind of contract governed by the UCC. In the vast majority of cases, the buyer's performance would consist of payment of the contract price; upon cancellation, the buyer has the right to the return of any moneys paid as well as to other remedies under the Code. See § 2-711(1) and *supra* text accompanying notes 67 and 68. Therefore, the option is attractive primarily to a seller who may be able to recover an amount in excess of the contract price of the goods sold. Because the policy issues presented by such a suit do not exist in an action for specific restitution, the latter is not included in the ensuing discussion.

84. See U.S.A. §§ 61, 65 (seller) and 69(2) (buyer), reprinted in 1A U.L.A. 150, 233, 294-95 (1950). The seller, under certain circumstances, could rescind and still sue for damages on the contract; the buyer could not. Llewellyn criticized this "inconsistent combination." Llewellyn, *supra* note 71, at 390.



term cancellation.<sup>85</sup> Whenever the term rescission is used in the Code, the preservation of contract rights is clearly stated.<sup>86</sup> However, a distaste for rescission and election of remedies does not necessarily equate with prohibition of a restitutionary recovery. Indeed, Professors Nordstrom and Palmer have argued that rescission is an unnecessary prerequisite to a restitutionary recovery.<sup>87</sup> Professor Palmer further argued that a restitutionary recovery *on* the contract is appropriate and the contract price does not necessarily limit that recovery.<sup>88</sup>

Both Nordstrom and Palmer have concluded that restitutionary recovery is available under the Code. Nordstrom, in his seminal article on restitution and Article 2, made his case by relying on the seller's right to cancel under section 2-703 (f)<sup>89</sup> and the definition of cancellation in section 2-106 (4).<sup>90</sup> These provisions, he argued, coupled with pre-Code restitution cases which could give specific meaning to the words "cancel" and "remedy," would justify an above contract recovery.<sup>91</sup> Palmer, while acknowledging that the catalogue of a seller's remedies in section 2-703 does not include restitution,<sup>92</sup> nevertheless concluded that such a remedy should be allowed:

since it is reasonably clear that the problems of restitution were not considered in the drafting of the Code. Restitution is governed by principles that cut across many kinds of transactions, including sales of goods, and these principles should not be set aside by a statute drawn with no such purpose in mind.<sup>93</sup>

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85. See e.g., § 2-703(f), *infra* note 89, and comment 1 to § 2-703 ("This Article rejects any doctrine of election of remedies . . ."). See also *supra* notes 67-68 and accompanying text. Mooney describes rescission and election of remedies as "[t]wo casualties" of the Code's change of prior contract rules. Mooney, *supra* note 3, at 237, n.36.

Llewellyn acknowledged that "[r]escission, properly handled, is a needed remedy." *Id.* at 388. However, given his views on election (see *supra* note 71), it is logical to conclude that the "needed remedy" to which he referred was the right to unilateral termination of the contract when the other party breached, with retention of the right to damages.

86. See § 2-720:

"Unless the contrary intention clearly appears, expressions of 'cancellation' or 'rescission' of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for antecedent breach."

And the comment following § 2-720 states:

"This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill-advised use of such terms as 'cancellation', 'rescission', or the like."

See also, § 2-608, *supra* note 71 and § 2-721, the section on remedies for fraud and the comment thereto which states that the section "makes it clear that . . . rescission of the contract for fraud . . . [does not automatically bar] other remedies . . ."

87. Nordstrom, *supra* note 33, at 1165, n. 94; Palmer, *supra* note 74, at 274.

88. Palmer, *supra* note 74, at 274, citing CORBIN, CONTRACTS §§ 1102, 1104, and 1113 (1951).

89. § 2-703 states:

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (§ 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may . . .

(f) cancel.

90. § 2-106 states:

"(4) 'Cancellation' occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of 'termination' except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance."

91. Nordstrom, *supra* note 33, at 1166. Accord 1 G. PALMER, *supra* note 78 § 4.16(a), at 501.

92. Comment 1 to § 2-703 provides that the remedies listed in that section "include all of the available remedies for breach." However, as one commentator has pointed out, the Code provides other seller's remedies not listed in § 2-703. See Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and 'Code' Methodology*, 18 B.C. IND. & COMM. L. REV. 655, 708, n. 303 (1977) (referring to the remedies in § 2-718). See also 1 G. PALMER, *supra* note 78 § 4.16, at 500-01, n. 11 (noting cases where courts granted sellers remedies not listed in § 2-703).

93. 1 G. PALMER, *supra* note 78 § 4.16(a), at 501. "Restitution based upon unjust enrichment cuts across many branches of the law, including contract, tort, and fiduciary relationship, but it also occupies much territory that is its sole

Apparent support for a restitutionary recovery can be found in two more Code provisions. Comment 1 to section 1-102 does, with approval, refer to pre-Code cases where courts "implemented a statutory policy with liberal and useful remedies not provided in the statutory text." Yet, the explicit *remedial* policy of the Code is stated in section 1-106 to include liberal administration of the remedies provided in the Code "to the end that the aggrieved party may be put in as good [not better] a position as if the other party had fully performed. . . ." <sup>94</sup> In addition, comment 1 to section 2-607 provides that the buyer is to pay for goods accepted a price "to be reasonably apportioned, using the type of apportionment familiar to the courts in quantum valebant cases." However, section 2-607 (1) explicitly states that the buyer is to pay "at the contract rate" for any goods accepted. Comment 1 begins with the statement that, once the buyer accepts goods, the seller acquires a right to the price as provided by the contract. Only the apportionment technique is borrowed from the restitution cases. <sup>95</sup>

When rescission prevailed, an above contract recovery was justified by the destruction of the contract. <sup>96</sup> That rationale is no longer maintainable <sup>97</sup> and is inconsistent with the Code's emphasis on commercial reality. <sup>98</sup> Palmer implied that an above contract recovery is justified because the partially performing party, whose full performance was prevented by the breaching party, never bargained to exchange proportional performance for *pro rata* contract price. <sup>99</sup> But, consistent with this point, Palmer also states that if a contract is divisible, recovery for part performance would be limited to the contract price. <sup>100</sup> Thus, with the installment seller, the nature of any recovery would depend upon a determination of whether the contract was divisible or entire. <sup>101</sup>

Comment 2 to section 2-612 states unequivocally that the distinction between divisible and entire contracts has no validity under Article 2. <sup>102</sup> Granted, the

preserve." *Id.* § 1.1, at 2. Professor Palmer outlines the scope of restitution and traces the history of quasi-contract in §§ 1.1 and 1.2 of his treatise. See also Perillo, *Restitution in a Contractual Context*, 73 COL. L. REV. 1209, 1215-16 (1973) (discussing the common law restitution action of general assumpsit).

94. Accord Mather, *supra* note 33, at 21 n. 20; Hillman, *supra* note 92, at 709.

95. Mather, *supra* note 33, at 20, n.21. Mather concluded that any partially performing seller (not only one in a sale of goods contract) should be precluded from recovering in excess of the contract price, since such a recovery conflicts with liberal principles of justice. These principles "impel courts to protect personal liberty and minimize coercion." *Id.* at 48.

96. See *supra* text accompanying note 78.

97. See *supra* note 78.

98. Even when the courts spoke of the destruction of a contract, the decisions clearly indicated that the existence of the contract was central to the plaintiff's case. See Palmer, *supra* note 74, at 273.

99. Palmer, *supra* note 74, at 276. Similarly, the defendant is not entitled to the overall contract gains "on an accrual basis," which would occur if a court limited the plaintiff to a pro-rated contract price recovery. *Id.* Palmer cautioned, however, that a breach which justified termination of a contract did not necessarily justify restitutionary remedies (*id.* at 280), and stated that "considerations of fairness" should determine the proper outcome in a given case. *Id.* at 281.

100. *Id.* at 279. See *supra* text accompanying note 76. While the full performance rule, which underlies this conclusion, has been attacked as unreasonable, it remains the law in most jurisdictions. 1 G. PALMER, *supra* note 78 § 4.3, at 378; Nordstrom, *supra* note 33, at 1152, n.41.

101. Nordstrom also retains this distinction. Nordstrom, *supra* note 33, at 1166.

102. Comment 2 of § 2-612 states:

"If separate acceptance of separate deliveries is contemplated, no generalized contrast between wholly 'entire' and wholly 'divisible' contracts has any standing under this Article."

comment generally addresses the applicability of the rules in section 2-612<sup>103</sup> and not the availability of restitutionary relief to an installment seller. However, resort to a distinction so definitively abandoned for all of Article 2 (and not just section 2-612 (1)) should be based upon a clearly stated Code policy to allow restitutionary recovery. As the foregoing discussion demonstrates, no such policy exists.

The resolution of this issue lies less in the explicit damage provisions of Article 2 than in the overall remedial goal contained in section 1-106. The goal of compensation is emphasized both in the wording of the section and in the accompanying comments.<sup>104</sup> Arguably, the seller's recovery of an amount in excess of the contract price for goods is overcompensation.<sup>105</sup> Furthermore, it is commercially reasonable<sup>106</sup> to define adequate compensation by the terms of the parties' agreement, especially where the issue is the price of accepted goods.

## V. CONCLUSION

This Article has addressed two issues: reinstatement by suit under UCC section 2-612(3) and the installment seller's right to restitutionary recovery under Article 2. Each issue required an examination of fundamental Code policies and the conclusions reached flow from those policies. Specifically, the jurisprudential underpinnings of the Code and the purposes underlying Article 2 point strongly to the conclusion that, where an aggrieved party in an installment contract overtly cancels, as provided in UCC section 2-612(3), that party's subsequent suit to recover damages on past installments does not reinstate the contract. Furthermore, a seller who sues on past installments should not be allowed a restitutionary recovery. Indeed, a restitution-based recovery by any seller of goods is inconsistent with the remedial policy and commercial character of the Code.

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Corbin referred to the words divisible and entire as "terms of confusion." CORBIN, *CONTRACTS* § 694, at 277. The confusion increased exponentially in installment sales contracts. *Id.* § 699, at 304. He listed fourteen different issues (not including restitutionary recovery) to which these concepts have been applied and concluded that courts should decide the issues based on "policy and precedent," not by labeling a contract as divisible or entire. *Id.* § 695, at 284-89.

It is reasonable to conclude that the Code drafters reacted to the aforementioned confusion in discarding the divisible/entire distinction.

103. The tension between the installment contract definition and the provisions of § 2-307 (presumption of delivery in a single lot) is discussed in Peters, *supra* note 49, at 223-24.

104. See comment 1: "[C]ompensatory damages are limited to compensation."

105. See Hillman, *supra* note 92, at 708-09. Cf. J. White and R. Summers, *supra* note 7, at 282-83 (arguing that a buyer should be able to limit a seller to recovery under section 2-708(2), where recovery under section 2-708(1) would result in overcompensation).

106. "Commercially reasonable" appears several times in Article 2 (see e.g., §§ 2-402, 2-609(1), 2-610(a), 2-706(2)); however, one must be careful not to ascribe an absolute meaning to so relative a term. See Mellinkoff, *supra* note 40, at 210-13. As used here, it means what makes good sense in a commercial context.

